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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/677,708	10/02/2003	Jerry H. Stoller	SOR028/189241	9195
23444 7590 12/08/2009 ANDREWS & KURTH, L.L.P. 600 TRAVIS, SUITE 4200 HOUSTON, TX 77002				
EXAMINER				
PRYOR, ALTON NATHANIEL				
ART UNIT		PAPER NUMBER		
1616				
NOTIFICATION DATE		DELIVERY MODE		
12/08/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

pat-tmk@andrewskurth.com

### Office Action Summary

**Application No.**

10/677,708

**Applicant(s)**

STOLLER, JERRY H.

**Examiner**

ALTON N. PRYOR

**Art Unit**

1616

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 September 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1.5-13, 16-18, 20, 21, 25-31, 33-43, 45 and 47-70 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.

- 6) ☒ Claim(s) 1.5-13, 16-18, 20, 21, 25-31, 33-43, 45, 47-70 is/are rejected.

- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.

- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-940)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

Applicant's arguments filed 9/29/09 have been fully considered but they are not persuasive. Previous rejections not addressed below are withdrawn.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1,5-13,16-18,20,21,25-31,33-43,45,47-70 are rejected under 35 U.S.C. 103(a) as being unpatentable over Clough (USPN 4496388; 1/29/85). Clough teaches a fungicidal composition comprising metal complex of the compound of formula I (abstract, column 6 lines 14-18). Clough teaches that the composition can comprise additional compounds such as auxins including indoleacetic acid, indole butyric acid, and naphthylacetic acid (column 11 lines 7-39), anionic surfactants including calcium lignosulphonate (column 10 lines 1-18) as well as ingredients such as calcium carbonate (column 9 lines 3-19). Clough teaches that the composition can exist in many forms including aqueous dispersions (column 9 lines 25-68). Clough teaches a method of controlling fungi such as phytophthora and rhizoctonia (column 6 lines 39-50) growth on plants such as coffee beans, soya beans and potatoes, i.e. monocots and dicots (column 6 lines 19-36, lines 55-66, column 7 lines 41-64), by applying the composition onto plants and/or their seeds. Clough does not exemplify an invention of controlling fungi by applying a composition comprising metal complex of the compound of formula I, indoleacetic acid, indole butyric acid and calcium lignosulphonate onto plants and/or their seeds. However, it would have been

obvious to arrive at such an invention since Clough suggests the combination of ingredients to be applied to plants and/or their seeds to control fungi growth. Clough does not teach the invention of treating onion plants and/or their seeds with the auxin and metal mixture. It would have been obvious to do this since an onion plant is a monocot plant.

*Response to Applicant's argument*

The Applicants argues that Clough teaches the use of hazardous compounds such as triazolylalkanetriols, whereas instant invention avoids the use of hazardous chemicals. Clough does not teach or suggest the substitution of hazardous triazolylalkanetriol compounds by instant environmentally friendly auxins. The Examiner reiterates that claims employ "comprising" language which allows for the inclusion of additional method steps such as a step of adding said hazardous chemicals (triazolylalkanetriols) like those disclosed in Clough. The Examiner further argues that amended claims do not avoid the use of the triazolylalkanetriols compounds taught by Clough. Note, instant claim language recites, "an aqueous solution including a fungi-inhibiting component consisting of". The "including" language makes the invention open to the ingredients disclosed in Clough. Therefore, triazolylalkanetriols taught by Clough can be added to the instant invention. Also note, Clough at column 10 lines 19 -26 teaches that compositions disclosed therein can be prepared in the form of an aqueous homogeneous preparation.

The Applicants argue the Clough does not disclose or suggest that auxins can be used as the active for inhibiting fungi and insects (larvae thereof) attack. The Examiner argues that a suggested aspect of Clough's invention involves the application of a composition containing auxins to plants (see column 9 lines 3-19 and column 11 lines 7-39). This scenario of Clough's invention embraces the same active step of the instant invention, i.e. the application of the

composition comprising an auxin to plants. Since Clough shares the same active step recited in the instant claims, it is automatic that both inventions would yield the same result, i.e. the protection of the plants from fungi and insects (larvae thereof) attack or infestation.

Applicant argues that neither the Clough patent nor the Drake and Eden patents, discloses/suggests the claimed use of an auxin as a means for controlling the infestation of fungi and insects and their larvae on plants. Clough does not teach/suggest the use of auxins together with micronutrients to protect plants from attack by fungi and insects and their larvae in the absence of triazole and imidazole compounds. The Examiner reiterates that Clough suggests that to his composition can be added other ingredients such as indoleacetic acid (auxin), indole butyric acid (auxin) and calcium carbonate (alkaline metal source). See column 9 lines 3-19 and column 11 lines 7-39. Clough teaches that the composition can be applied to plants in order to control fungi growth (column 6 line 19 - column 7 line 64). While it is true that Clough does not exemplify a composition comprising indole acetic acid or indole butyric acid plus calcium carbonate and the composition's application to plants, Clough does suggest the combination of ingredients and its application to plants; thus, the suggestion makes obvious the instant invention. A reference is not required to provide all composition and application method scenarios to render an invention obvious. It is reiterated that instant claims employ "comprising" language which allows for the inclusion of additional method steps such as a step of adding a hazardous chemical like those disclosed in Clough.

***Telephonic Inquiry***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ALTON N. PRYOR whose telephone number is (571)272-0621. The examiner can normally be reached on 8:00 a.m. - 4:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Johann Richter can be reached on 571-272-0646. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Alton N. Pryor/  
Primary Examiner, Art Unit 1616